



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAIROBI

PETITION NO. 1 OF 2019

MATHEW WAMBUA.....1ST PETITIONER
JOSEPH MWANGANDI.....2ND PETITIONER
FRANCIS N. MASIGWA.....3RD PETITIONER
JOSEPH L. MAIYA.....4TH PETITIONER
JAMES N. GATHIGI.....5TH PETITIONER
JACKSON AFUNDI.....6TH PETITIONER
JAMES N. WANYEKI.....7TH PETITIONER
RAPHAEL K. MAFURA.....8TH PETITIONER
MARTION O. OLOO.....9TH PETITIONER
JAMES WAMBUNDO.....10TH PETITIONER
MOFFAT G. MWANIKI.....11TH PETITIONER
DANIEL HOSEAH KAMURU.....12TH PETITIONER
SAMUEL M. OSALE.....13TH PETITIONER
FRANCIS M. MUINDA.....14TH PETITIONER
JOEL WACHIRA GATE.....15TH PETITIONER
RASHID CHIDZUNGA.....16TH PETITIONER

-VERSUS-

CABINET SECRETARY MINISTRY OF
ENVIRONMENT AND FORESTRY.....1ST RESPONDENT
CHAIR PERSON PUBLIC SERVICE COMMISSION.....2ND RESPONDENT
CHAIR PERSON SALARIES AND
REMUNERATION COMMISSION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

JUDGMENT

The claimant filed a petition on 04.01.2019 through Muraguri, Muigai, Waweru & Company Advocates. The petitioners' case is that the circular dated 26.11.2018 stopping monthly payment of the special house allowance to the petitioners was unfair, unlawful and unconstitutional because it violates their fundamental rights and freedoms. In particular the petitioners' case is that the stoppage of the payment of the special house allowance was unconstitutional for violating the right to equality and freedom from discrimination under Article 27; right to accessible and adequate housing under Article 43; right to freedom from cruel and degrading treatment under Article 29; right to fair labour practices under Article 41; and right to fair administrative action under Article 47 of the Constitution of Kenya, 2010.

The interested party filed on 20.02.2019 the replying affidavit of Anne R. Gitau (Chief Executive Officer and Commission Secretary) and through Rosalie W. Wafula Advocate. The interested party is established under Article 230 of the Constitution. The powers and functions of the interested party include setting and regularly reviewing the remuneration and benefits of all State Officers; and advise the National and County Governments on the remuneration and benefits of all other public officers. The principles that guide the interested party's functions include the need to ensure that the total public compensation bill is fiscally sustainable; the need to ensure that public service is able to attract and retain the skills required to execute their functions; the need to recognise productivity and performance; and transparency and fairness.

The interested party is further vested with additional functions under section 11 of the Salaries and Remuneration Commission Act, Cap 5F of the Laws of Kenya. The interested party's case is that house allowance payable to all public servants was prior to the establishment of the interested party provided for in circulars issued from time to time by the ministry responsible for public service. One of the consideration by the ministry responsible for public service was to allow civil servants deployed in hardship areas (such as the petitioners) to retain house allowance rates of their previous station if they were higher. That was to enable the officers to house their families in event the family members could not relocate to hardship areas. Such officers were not awarded additional house allowance to cater for housing in the hardship areas as that would amount to double compensation. The officers working in places designated as hardship areas are paid monthly hardship allowance to compensate for lack of social services or amenities. It is expected that the hardship allowance would enable the officers pay rent in such stations of deployment. By the circular dated 10.12.2014 ref. No. SRC/ADM/CIR/1/13/Vol.III (126) the interested party communicated new rates for hardship allowance and house allowance. The circular reviewed hardship allowance so that for similar ranks or grades, it was paid at flat rates across the public service. The circular reviewed and harmonised the allowances mentioned in the circular. The court observes that the circular did not mention special house allowance which is the subject of the present petition. The interested party's further case in paragraph 13 and 14 of the replying affidavit is as follows:

“13. The Commission has NOT advised on Special House Allowance and the circulars on the subject matter cease to apply.

14. The arrangement of paying special house allowance is irregular and against SRC advice. Where organisations have institutional house, such institutions are free to house their staff but not pay any allowance.”

The 2nd respondent opposed the petition by filing on 19.03.2019 the replying affidavit of Simon K. Rotich (Chief Executive Officer and Commission Secretary) and through the Hon. Attorney General. The 2nd respondent's case is as follows. The 1st respondent made a request to the 2nd respondent about guidance on retention of House Allowance on transfer of officers to areas designated as hardship area. The request was based on a number of requests received from officers who are transferred to the designated hardship areas requesting to retain higher house allowance that were payable to them in their previous stations. The 1st respondent's request to the 2nd respondent was by the letter Ref. No. DENR/HRM/12/VOL.IV/(13) dated 13.04.2018. The request addressed to the 2nd respondent was as follows;

“RETENTION OF HOUSE ALLOWANCE ON TRANSFER OF OFFICERS TO DESIGNATED HARDSHIP AREAS

This is in reference to a number of requests by officers who are transferred to hardship areas after the operationalization of Human Resource Policies and Procedures Manual for the Public Service May, 2016.

The HR Manual has no item on retention of house allowance for the former stations of officers transferred to designated hardship areas. The Code of Regulations revised in 2006, section L.3 allowed officers transferred to hardship areas to retain house allowance for their former stations on condition that they are not transferred on their own request.

The purpose of this letter therefore, is to seek clarification on treatment of such cases and the cases for officers who were transferred to hardship areas before May, 2016 and are already drawing the higher house allowance.

Attached herewith, are copies of relevant documents.

Signed

M.S. Gitari

For: PRINCIPAL SECRETARY”

The 2nd respondent considered the request and replied the 1st respondent by the letter Ref. No. PSC/FIN/2/(101) dated 03.05.2018 thus;

“RETENTION OF HOUSE ALLOWANCE ON TRANSFER OF OFFICERS TO DESIGNATED HARDSHIP AREAS

Please refer to your letter Ref. N. DENR/HRM/12/VOL.IV/(13) dated 13th April, 2018 on the above subject.

Kindly note that currently there is no provision of retention of House Allowance on transfer to areas designated as hardship as eligibility for the payment of House Allowance is based on the current station of officers as determined by the Salaries and Remuneration Commission.

Signed

J.A. MACHAYO

FOR: SECRETARY/CEO

PUBLIC SERVICE COMMISSION”

The 2nd respondent acknowledges that prior to the HR Manual of 2016, the repealed Code of Regulations (Revised 2006) had a provision under section L.3 which stated that an officer transferred to a designated hardship area in the interest of the service, may retain the house allowance applicable to his former station or draw house allowance applicable to his new station (hardship area), whichever is higher. However, the provision did not apply to an officer transferred on own request. Further the HR Manual of 2016 was developed through a consultative process and widely circulated to stakeholders for participation and, there was no contention on the removal of the section on retention of house allowance for officers transferred to designated hardship areas. The 2nd respondent's case is that the 1st respondent harmonised the hardship allowance in designated hardship areas by the circular dated 10.12.2014 ref. No. SRC/ADM/CIR/1/13/Vol. III (126) and circular ref. No. SRT/TS/MDP/3/1/2(2) OF 11.08.2015 the hardship allowance compensated for all hardships including housing.

The 1st respondent filed on 16.04.2019 the replying affidavit of Silas Mugambi Gitari, Director of Human Resource and Development in the Ministry. The 1st respondent's case is that petitioners are paid salaries and allowances regulated by the interested party. The 1st respondent says it withdrew the Special House Allowance as directed by the interested party. The Court observes that the 1st respondent has not exhibited the alleged directive by the interested party. Further, the payment of the allowance would amount to misuse of public funds as it would be illegal to pay. It is also the 1st respondent's case that the Human Resource Policies and Procedures Manual 2016 did not provide for the allowance.

The Court has carefully considered the material on record.

First, the petitioners' case is that they have all along been paid Rental House Allowance; Special House Allowance; and Hardship Allowance. The exhibited payslip for Mathew Wambua Ndungo for Nov.2018 shows that he was paid the three allowances at Kshs.15,400.00, Kshs.19, 600.00, and Kshs. 17, 100.00 respectively. However, effective December 2018 his payslip shows the Special House Allowance was not paid but he was paid Hardship Allowance and Rental House Allowance at the same rate as was paid in November 2018. To that extent the Court finds that the petitioners have established that indeed effective December 2018 the respondents have effectively withheld payment of Special House Allowance. There is no evidence that the respondents notified the petitioners and consulted them prior to withholding that payment. Section 13 (1) of the Employment Act, 2007 required the respondents to notify the petitioners about that change by way of a written statement containing particulars of the change. Further, section 10 (5) of the Act provides that where any matter in subsection 10(1) of the Act changes (being a change in the terms and conditions of the contract of service such as payment of the Special House Allowance in issue), the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing. Thus the Court returns that the petitioners have established that the respondents violated Article 27(1) which provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Further the petitioners have established that the withdrawal or failure to pay the Special House Allowance was an adverse decision and they were entitled to a fair procedure and to be given written reasons as per Article 47 (1) and (2) but that was not done. There is no reason to doubt that the failure to pay the allowance occasioned the petitioners serious financial embarrassment, hardship and suffering. The Court returns that the failure to pay amounted to unfair labour practice in violation of Article 41 (1). Thus, the petitioners' case in that regard will succeed.

Second, it is the interested party's case in the replying affidavit thus;

“13. The Commission has NOT advised on Special House Allowance and the circulars on the subject matter cease to apply.

14. The arrangement of paying special house allowance is irregular and against SRC advice. Where organisations have institutional house, such institutions are free to house their staff but not pay any allowance.”

Article 259 (3) (a) of the Constitution provides that every provision of the Constitution shall be construed according to the doctrine that the law is always speaking and therefore a function or power conferred by the Constitution on an office may be performed or exercised as occasion requires, by the person holding the office. Article 259 (11) states that if a function or power conferred on a person under the Constitution is exercisable by the person only on advise or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that the Constitution provides otherwise. The Court finds that the interested party has by its own evidence confirmed that it has not advised on Special House Allowance and the withdrawal or failure to pay the allowance on the part of the respondents was unconstitutional. There is no evidence that the circulars by the interested party and the decisions by the respondents as exhibited dealt with the issue of Special House Allowance. Accordingly, the Court returns that there exists no constitutional and lawful decision to fail to pay or to withhold the petitioners' accrued right to earn Special House Allowance. It cannot be that because the interested party had not advised, then the allowance ceased to apply automatically. There was no exhibited decision by the respondent or interested party that the allowance ceased to apply.

Third, clause C.23 of the Human Resource Policies and Procedures Manual 2016 on other allowances provides that the Government may pay other allowances to different categories of public officers in various circumstances. Such allowances shall be determined and communicated from time to time. The evidence is that the historical background is that it was determined sometimes back that the petitioners

are paid Special House Allowance. The petitioners' case and evidence that the allowance had been paid since they joined the civil service on first appointment has not been challenged by the respondents and the interested party.

Fourth, the interested party submits that no order can issue because none was prayed for. The Court finds that the prayers are not set out elegantly at the end of the petition as it traditionally happens in most petitions but it is clear that the petitioners are seeking a remedy with respect to the alleged violation of their rights and freedoms and Article 159 applies accordingly.

In conclusion judgment is hereby entered for the petitioners against the respondents as the petition is allowed with a declaration that the purported failure to pay the petitioners' Special House Allowance or withholding or withdrawing of the allowance amounted to violation of the petitioners' rights in Articles 27(1), 41 (1) and 47 (1) and (2) of the Constitution of Kenya, 2010.

Signed, dated and delivered in court at **Nairobi** this **Friday, 8th November, 2019**.

BYRAM ONGAYA

JUDGE